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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 803

UNITED STATES GYPSUM COMPANY,
Petitioner and Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	17
APPENDIX A—Statute	i
APPENDIX B:	
5th Cir. Decision, Sept. 21, 1967	ix
APPENDIX C:	
NLRB Dec., 161 NLRB No. 61 (Oct. 28, 1966)	xxviii
NLRB Certificate (Dec. 2, 1966)	xxxiii

LIST OF AUTHORITIES CITED.

Cases.

American Seating Corp., 106 NLRB 250, 255 (1963)	13
American Ship Bldg. Co. v. NLRB, 380 U. S. 300, 317-8 (1965)	11
Atkinson v. Sinclair Refining Co., 370 U. S. 238, 241 (1961)	14, 15
Austin Mailers Union v. Newspapers, Inc., 329 F. 2d 312 (CA 5, 1964), cert. denied 377 U. S. 985 (1964), aff'g 226 F. Supp. 600 (1963)	12
Belsinger Signs, Inc. v. Electrical Workers, 231 F. Supp. 741 (D. C. D. C. 1964), aff'd 339 F. 2d 742	9

Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 553, 555 (D. Mass. 1956), aff'd 241 F. 2d 787 (CA 1, 1957), cert. denied 335 U. S. 817..... 12

Carey v. Westinghouse, 375 U. S. 261, 272 (1964)..... 9

Carpenters Union v. Ebanistiria Quintana, 56 LRRM 2391 (D. P. R. 1964)..... 16

Fabrica De Muebles Puerto Rico, 107 NLRB 905, 912-913 (1954)..... 12

Fagan v. Penn. R. R. Co., 173 F. Supp. 465, 470 (E. D. Pa. 1959)..... 15

Flowers v. Locomotive Firemen and Enginemen, 212 Ga. 142, 91 S. E. 2d 41, 43 (1956)..... 15

Franks Bros. Co. v. Labor Board, 321 U. S. 702, 704 (1944)..... 9

Garment Workers v. Labor Board, 366 U. S. 731, 737-8 (1960)..... 7, 8, 10

Glendale Manufacturing Co. v. Local 520, Etc., 283 F. 2d 936, 938 (CA 4, 1960)..... 7, 8

Haynes v. U. S. Pipe and Foundry Co., 362 F. 2d 414, 416, f.n. 2 (CA 5, 1966)..... 11

Independent Petroleum Workers v. American Oil Co., 324 F. 2d 903, 906 (CA 7, 1963)..... 9

Loving & Evans v. Blick, 33 C. 2d 603, 204 P. 2d 23, 28 (1949)..... 17

Leedom v. International Broth. of Elec. Workers, 278 F. 2d 237, 239 (107 U. S. App. D. C. 357, 359)..... 9

Milk and Ice Cream Drivers Union, Local 98 v. McCulloch, 306 F. 2d 763, 765, 766 (CA D. C. 1962)..... 8, 9, 10

Modine Mfg. Co. v. Grand Lodge Int. Ass'n of Mach., 216 F. 2d 326, 329 (CA 6, 1954)..... 8, 10, 16

McGuire v. Humble Oil & Refining Company, 355 F. 2d 352, 358 (CA 2, 1966) 8

McLeod v. Television & Radio Artists, 234 F. Supp. 832, 842 (D. N. Y. 1964), aff'd per curiam 351 F. 2d 310 (CA 2, 1965) 17

New Jersey Bell Telephone Co. v. Communication Workers of America, 5 N. J. 354, 75 Atl. 2d 721, 728 (1950) 16

New York Mirror, 151 NLRB 834, 838 (1965) 13

NLRB v. Amer. Nat. Ins. Co., 343 U. S. 395, 404 (1952) 11

NLRB v. Clegg, 304 F. 2d 168, 175-6 (CA 8, 1962) 8

NLRB v. Insurance Agents International, 361 U. S. 477, 490 (1960) 11

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45 (1937) 11

NLRB v. Royal Plating & Polishing Co., Inc., 350 F. 2d 191, 196 (CA 3, 1965) 13

NLRB v. Warrensburg & Paper Corporation, 340 F. 2d 920, 924, 925 (CA 2, 1965) 9

Portland Webb Pressmen's Union v. Oregonian Pub. Co., 286 F. 2d 4, 10 (CA 9, 1960) 10

Retail Clerks v. Montgomery Ward & Co., 316 F. 2d 754, 757 (CA 7, 1963) 8

Smith v. Gladney, 128 Tex. 354, 98 S. W. 351, 352 (1936) 17

Steelworkers v. Enterprise Corp., 363 U. S. 593, 597 (1960) 14

Steelworkers v. Warrior & Gulf Co., 363 U. S. 574, 582 (1960) 11

Terminal Railway Assoc. v. Brotherhood of R. R. Trnm., 318 U. S. 1, 6 (1943) 11

Trailomobile Co. v. Whirls, 331 U. S. 40, 53 (1957) 15
Typographical Union v. NLRB, 368 F. 2d 755, 757 (CA 5, 1966) 9
Wiley v. Livingston, 376 U. S. 543, 547, 551 (1964) 8, 9, 12, 14, 15

Statute.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, et seq.):
Section 7 7
Section 8(a) (1) 8
Section 8(a) (2) 8
Section 8(a) (5) 9
Section 8(b) (1) (A) 7
Section 8(d) 8
Section 9 10
Section 301 3
Section 302 .... 15, 16

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UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Appellee Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on September 21, 1967.

CITATIONS TO OPINIONS BELOW.

The findings of fact and conclusions of law and judgment of the District Court are not reported and are set out in the record printed in the Court of Appeals (R. 94-100). The opinion of the Court of Appeals, printed in Appendix B hereto (pp. ix-xxvii) has not yet been officially reported. The decision of the NLRB, printed in Appendix C hereto (pp. xxviii-xxxiii) is reported in 1967 CCH ¶ 20,836.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 21, 1967 (R. 133). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a purchaser and subsequently operator of a lime plant property, who was not advised until after the purchase by a labor organization of its claims under an existing collective agreement with the seller and did not assume that agreement, is obligated under the arbitration clause in said agreement to arbitrate with said labor organization grievances alleging purchaser's refusal to recognize (1) said labor organization as collective bargaining representative and (2) said collective agreement, where said labor organization has been decertified by the National Labor Relations Board as collective bargaining representative of the purchaser's employees in a representation proceeding instituted by the purchaser.

2. Whether the following grievances present arbitrable issues between a purchaser and subsequently operator of a lime plant property and a labor organization under the arbitration clause of a collective agreement between the seller and said labor organization giving the arbitrator jurisdiction and authority "to interpret, apply or determine compliance with the provisions of this agreement" and providing that, "The arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this contract":

(a) The refusal of said purchaser to recognize said collective agreement, where the agreement did not contain any provisions pertaining to the obligations of a purchaser of said property and the usual clause

that the agreement is binding upon the successors and assigns of the parties.

(b) The alleged failure of said purchaser to comply with an alleged seniority clause in said collective agreement, where there remains unresolved a genuine issue of fact as to whether said seniority clause was a part of said collective agreement at the time of said purchase.

(c) The refusal of said purchaser to check off membership dues to said labor organization pursuant to authorizations given under said collective agreement and addressed to the seller, where said labor organization has not delivered to the purchaser check-off authorizations from any of the purchaser's employees and has been decertified by the National Labor Relation Board.

STATUTE INVOLVED.

The statutory provisions involved are Sections 7-9, 201, 203, 204, 301 and 302 of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519 (29 U. S. C. §§ 157-9, 171, 173, 174, 185 and 186), the pertinent provisions of which are printed in Appendix A (pp. i-viii).

STATEMENT.

The complaint in the District Court was filed by Respondent on June 11, 1965 under Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156 (29 U. S. C. § 185) for a declaratory judgment that Petitioner, who had purchased and subsequently operated a lime plant property at Montevallo, Alabama, was bound by the collective agreement existing between Respondent and the seller of said plant at the time of the purchase and for other relief, including an order on Petitioner to arbitrate Respondent's

claims of non-compliance with said agreement in accordance with the arbitration clause therein.

Petitioner filed a motion to dismiss the complaint, and on May 28, 1965 instituted a representation proceeding before the National Labor Relations Board to determine whether Respondent was the collective bargaining representative of employees at said plant. Respondent appeared in said proceeding and contended that its collective agreement with the seller was a bar to an election. On January 17, 1966, Petitioner filed its answer to Respondent's complaint and a motion to stay the action until disposition of said representation proceeding.

On March 11, 1966, the Board dismissed the representation proceeding on the ground that henceforth it would, before proceeding with an employer's representation petition, require an affirmative showing of good faith doubt of the union's majority status on the part of the Petitioner, and Respondent had made no such showing (157 NLRB No. 60). On March 28, 1966, Petitioner instituted a second representation proceeding before the Board which was supported by evidence of its good faith doubt of Respondent's majority status. This proceeding, by stipulation between Petitioner and Respondent, was referred to the Board for decision on the record in the prior representation proceeding.

On March 29, 1966, Respondent filed a motion for summary judgment. On May 27, 1966, Petitioner filed an amended answer to the complaint which included as defenses the modification of said collective agreement prior to Petitioner's purchase of the plant and the issues presented in this petition. Affidavits were filed in support of and opposition to the motions before the District Court.

On May 27, 1966, the District Court entered final judgment (1) denying Respondent's motion to stay the action

and (2) ordering the parties to submit to arbitration certain grievances submitted to Petitioner on May 17, 1965, *i.e.*:

> "1. The Company refuses to recognize and comply with the contract executed on March 30, 1965.
>
> "2. The Company has filled vacancies such as burner helper without complying with Article VIII of the contract.
>
> "3. The Company has failed and refused to deduct union dues in accordance with Article VI of the contract.
>
> "4. The Company has refused to recognize seniority as established in Article VIII of the contract.
>
> "5. The Company has announced that it is not bound by said contract.
>
> "6. The Company has refused to recognize or deal with the duly authorized officers and representatives of the Union."

Respondent's appeal from this judgment was docketed in the Court of Appeals on July 24, 1966.

On October 28, 1966, the Board, rejecting Respondent's contract bar contention, entered its decision and direction of election in the representation proceeding (161 NLRB No. 61). On December 2, 1966, after an election, the Board issued its certification that Respondent was not the collective bargaining representative of Petitioner's employees at said plant. This certification was brought to the attention of the Court of Appeals and the effect thereof considered by that Court.

The Court of Appeals, on September 21, 1967, issued its opinion and entered judgment affirming the judgment below. Petitioner here seeks review of that decision.

The basic facts set forth in affidavits presented to the District Court are undisputed. On March 30, 1965, Petitioner purchased the lime plant property of United Cement Company (seller) at Montevallo, Alabama, and in con-

nection with said purchase expressly refused to assume certain contracts of the seller, including the existing collective agreement with Respondent. This agreement, dated March 30, 1964, was for a term of three years, but Article VIII with reference to seniority and other provisions thereof had been abandoned prior to the purchase and were no longer a part of the agreement. The final step in the grievance procedure, Article IX of said agreement, provided for arbitration with the limitation that, "The arbitrator shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this agreement. The arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this contract."

Petitioner commenced operation of said plant on April 5, 1965, at which time all former employees of the seller except three were employed by Petitioner, who manufactured substantially the same products as the seller. Petitioner's terms and conditions of employment at the plant were not different from those of the seller except that Petitioner did not check off union dues, advised employees that their seniority started from their employment by Petitioner and placed in effect, without objection from Respondent, improved group health insurance and safety programs. Length of service with the seller was given full recognition and employees have received vacations equal to or greater than the vacations which they would have received under said agreement.

Respondent did not contact Petitioner prior to the purchase other than by a letter mailed to Petitioner on March 29, 1965 stating that Respondent had been advised of the purchase and would be happy to meet with Petitioner. Petitioner heard nothing thereafter from Respondent until about May 3, 1965, at which time Respondent's business representative inquired by telephone concerning April, 1965

dues deductions and was told that Petitioner had not received check-off authorizations from any employees and that the deduction of Respondent's dues by Petitioner involved a legal question. Respondent stated it would submit a memorandum of its position. On May 17, 1965, Respondent presented the grievances *sub judice*. On May 28, 1965, Petitioner by letter advised Respondent, *inter alia*, that it had not purchased the seller in its entirety but only physical assets, that it had not deducted union dues because it had not received check-off authorizations from employees to do so, that information available to Petitioner indicated no union currently represented a majority of Petitioner's employees and Petitioner assumed that Respondent would include a statement of its representation status in the memorandum of its position mentioned in the telephone conversation on May 3, 1965. Without further contact with Petitioner, Respondent filed its complaint in the District Court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below on question one conflicts in principle with the decision of this Court in *Garment Workers* v. *Labor Board*, 366 U. S. 731, 738, that an employer may not extend exclusive recognition to a union which is not authorized to act as collective bargaining representative by a majority of the employees.

It is a basic part of the National Labor Relations Act that employees have freedom of choice of their collective bargaining representative and also the right to decline to be represented by a labor organization. Decertification proceedings are predicated on this latter right accorded by Section 7 of the Act (29 U. S. C. § 157) (*Glendale Manufacturing Co.* v. *Local 520, Etc.*, 283 F. 2d 936, 938 (CA 4, 1960))—a right expressly protected from union interference by Section 8(b)(1)(A) (29 U. S. C. § 158(b)

(1)(A)). Continued recognition of the repudiated representative by the employer following decertification by the Board would violate Sections 8(a)(1) and (2) of the Act. *Garment Workers* v. *Labor Board*, 366 U. S. 731, 737-738 (1960); *NLRB* v. *Clegg*, 304 F. 2d 168, 175-6 (CA 8, 1962).

The Act envisages a system of collective bargaining with labor organizations which have the support of a majority of the employees in the bargaining unit and hence rejects the conception that collective agreements, the end product of the bargaining process, outlast the decertification itself. Such contracts cannot endure in frustration of the public policy effectuated through the decertification proceeding. *Milk and Ice Cream Drivers Union, Local 98* v. *McCullough*, 306 F. 2d 763, 766 (CA D. C. 1962).

The Act requires that the collective agreement must be administered by a representative of the employees' own choosing. *Modine Mfg. Co.* v. *Grand Lodge Int. Ass'n of Mach.*, 216 F. 2d 326, 329 (CA 6, 1954). *Ergo*, such representative subsequent to his repudiation has no right to enforce the agreement including the processing and arbitration of grievances, which is clearly a part of the collective bargaining process as defined in Section 8(d) of the Act (29 U. S. C. § 158(d)). *McGuire* v. *Humble Oil & Refining Company*, 355 F. 2d 352, 358 (CA 2, 1966); *Retail Clerks* v. *Montgomery Ward & Co.*, 316 F. 2d 754, 757 (CA 7, 1963); *Glendale Manufacturing Co.* v. *Local 520, Etc.*, 283 F. 2d 936, 938 (CA 4, 1960).

The Court of Appeals ignored these principles under the misconception that Petitioner, a purchaser of a business property, was bound to arbitrate with Respondent under *Wiley* v. *Livingston*, 376 U. S. 543, 551 (1964), because, *inter alia*, of the "substantial continuity of identity in the business enterprise," regardless of the decertification of Respondent. Unlike *Wiley*, however, Respondent here seeks to be recognized as collective bargaining representative for all

of the employees in the unit and to administer the collective agreement governing employees whom it does not represent, having been decertified. In *Wiley*, this Court held that a labor organization could arbitrate for the employees that it represented but expressly refused to "suggest any view on the questions surrounding a certified union's claim to continued representation status following a change in ownership." (376 U. S. at 551.)

Any award of an arbitrator on the issue of recognition of Respondent cannot alter Respondent's representation status. An award in favor of Respondent would conflict with the Board's decertification decision and the Board's decision must prevail. *NLRB* v. *Warrensburg Board & Paper Corporation*, 340 F. 2d 920, 924 (CA 2, 1965); *Typographical Union* v. *NLRB*, 368 F. 2d 755, 757 (CA 5, 1966); *Carey* v. *Westinghouse*, 375 U. S. 261, 272 (1964); *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702, 704 (1944). There is no question here of the validity of the Board's decision. Respondent appeared in the proceeding and contended that its contract was a bar to an election and there was no lack of due process. *Milk and Ice Cream Drivers Union, Local 98* v. *McCulloch*, 306 F. 2d 763, 765 (CA D. C. 1962); *NLRB* v. *Warrensburg Board & Paper Corporation*, 340 F. 2d 920, 925 (CA 2, 1965); *Leedom* v. *International Broth. of Elec. Workers*, 278 F. 2d 237, 239 (107 U. S. App. D. C. 357, 359). Respondent took no steps to secure review of the Board's action. In addition, the issue of refusal to recognize Respondent does not assert violation of the collective agreement by Petitioner but only of an obligation imposed by law, an unfair labor practice under Section 8(a)(5) of the Act (29 U. S. C. § 158(a)) which is exclusively within the jurisdiction of the Board. *Independent Petroleum Workers* v. *American Oil Co.*, 324 F. 2d 903, 906 (CA 7, 1963); *Belsinger Signs, Inc.* v. *Electrical Workers*, 231 F. Supp. 741 (D. C. D. C. 1964),

aff'd 339 F. 2d 742; *Portland Webb Pressmen's Union* v. *Oregonian Pub. Co.*, 286 F. 2d 4, 10 (CA 9, 1960).

The decision of the Court below, that Petitioner is required to arbitrate with Respondent, a decertified union, with reference to its recognition as collective bargaining representative for all employees in the unit conflicts in principle with the landmark decision of this Court, *Garment Workers* v. *Labor Board*, 366 U. S. 731, 738, to the effect that continued recognition of the repudiated representative by the employer would constitute a violation of the Act. In addition, its decision that Petitioner is required to arbitrate recognition of said collective agreement, which also encompasses recognition of Respondent, conflicts in principle with the decision of the Court of Appeals of the District of Columbia, *Milk and Ice Cream Drivers Union, Local 98* v. *McCulloch*, 306 F. 2d 763, 766, hereinbefore cited, to the effect that a collective agreement cannot endure "in frustration of the public policy effectuated through section 9 proceedings" and also the decision of the Court of Appeals for the Sixth Circuit, *Modine Mfg. Co.* v. *Grand Lodge Int. Ass'n of Mach.*, 216 F. 2d 326, 329, that "the bargaining contract must be administered by a representative of the employees' own choosing" and decisions of the Courts of Appeal for the Fourth and Seventh Circuits, hereinbefore cited, to similar effect (283 F. 2d 936, 938; 316 F. 2d 754, 757). The decision would require Petitioner to violate the National Labor Relations Act by entering into arbitration with a decertified labor organization. Petitioner respectfully submits that it is of substantial importance to employers, employees and labor organizations and the National Labor Relations Board alike, and in the interest of industrial peace, that this conflict with regard to the recognition to be given to a decertification by the Board of the collective bargaining representative of employees following a transfer, however effected, of a business enterprise be finally resolved by this Court.

2. The decision of the Court below on question one also conflicts in principle with the many decisions of this Court and Courts of Appeal that federal policy requires the voluntary consummation of collective agreements as opposed to compulsory arbitration in labor disputes.

The duty to arbitrate grievances under the seller's collective agreement must be accommodated with the Act's policies favoring voluntary agreements and not permitted to encompass contract assumption—else compulsory arbitration comes into play and free collective bargaining is destroyed.

The decision below requiring Petitioner to arbitrate recognition of Respondent's collective agreement with the seller, which Petitioner did not assume, invests the arbitrator with authority to make the contract binding on Petitioner and thus to fix terms and conditions of employment—an area heretofore exclusively reserved to employers and employees through free collective bargaining and upon which the courts have never let the National Labor Relations Board encroach. See *NLRB* v. *Insurance Agents International*, 361 U. S. 477, 490 (1960); *NLRB* v. *Amer. Nat. Ins. Co.*, 343 U. S. 395, 404 (1952); *American Ship Bldg. Co.* v. *NLRB*, 380 U. S. 300, 317-8 (1965); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937); *Cf. Terminal Railway Assoc.* v. *Brotherhood of R. R. Trnm.*, 318 U. S. 1, 6 (1943).

The duty to arbitrate is contractual in origin (*Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582 (1960) and the settlement by arbitration of terms and conditions of employment should not be imposed by law (*Haynes* v. *U. S. Pipe and Foundry Co.*, 362 F. 2d 414, 416 f.n. 2 (CA 5, 1966)). The decision below, however, in a real sense, gives the arbitrator authority through the contract assumption issue to deny Petitioner freedom in the negotiation and

consummation of a contract and to establish continuing terms and conditions of employment between Petitioner and its employees. *Boston Printing Pressman's Union* v. *Potter Press,* 141 F. Supp. 553, 555 (D. Mass. 1956) aff'd 241 F. 2d 787 (CA 1, 1957) cert. denied 355 U. S. 817. This quasi-legislative arbitration ordered by the District Court conflicts so directly with the policy of the federal labor law that this Court declined to review a decision of the lower court refusing to order the arbitration of future contract terms even though the parties had originally agreed to such arbitration. *Austin Mailers Union* v. *Newspapers, Inc.,* 329 F. 2d 312 (CA 5, 1964), *cert. denied* 377 U. S. 985 (1964), *aff'g* 226 F. Supp. 600 (1963).

The decision below fails to recognize that the decision of this Court in *Wiley* is entirely consistent with the basic federal policy of voluntary consummation of collective agreements. *Wiley* involved rights of individual employees under an expired contract whereas this case involves an imposition *in futuro* on the purchaser and all of the employees of an entire collective agreement.

In addition, the decision of the Court below, by creating a situation under which employment relations with the new employer may be frozen, will tend to create employment unrest. There was no point in rejecting Respondent as exclusive bargaining representative if the employees would not be free to secure new terms of employment. *Cf. Fabrica De Muebles Puerto Rico,* 107 NLRB 905, 912-913 (1954). The repudiation of Respondent by Petitioner's employees indicated that the employees were dissatisfied with the contract or Respondent's administration thereof, or both. Under these circumstances the arbitration of recognition of Respondent and Respondent's agreement cannot be expected to promote industrial peace. This is particularly true in this action where the seller was a small corporation with limited resources and the purchaser a larger

corporation with comparatively ample assets, affording employees greater opportunity to better their position. This is illustrated in this case by the prompt instituting of an improved group insurance plan and improved safety program. The Court below refers to rights arising out of the agreement after the purchase and subsequent to decertification, citing as classic examples the right of seniority and rights under a welfare or pension plan. But the collective agreement here did not include a seniority clause and there was no welfare or pension plan under the seller. If these rights had existed their resolution could have been negotiated with the seller (*NLRB* v. *Royal Plating & Polishing Co., Inc.*, 350 F. 2d 191, 196 (CA 3, 1965); *New York Mirror*, 151 NLRB 834, 838 (1965)) and there was no need, if any basis, in this case for arbitration to settle these matters with the purchaser.

It is realized that a rule of law may not be derived from special circumstances of one case, but, generally speaking, it is natural that employees would expect different terms and conditions of employment from a new employer and, in most instances at least, hope to improve their lot. Cf. *American Seating Corp.*, 106 NLRB 250, 255 (1963). This is likely to be the fact in the present era of corporate acquisitions and because of the overall resultant inflation that has persisted since the beginning of the nation. There is also the probability of discouraging purchasers with the result that employees must remain with a small and probably less efficient operator. It is respectfully submitted that in view of the general economic situation and the circumstances present here, this Court should review the decision of the Court of Appeals directing arbitration by Petitioner of recognition of the collective agreement with the seller to determine whether it is consistent with basic federal labor policy and will promote the objectives of an arbitration in accordance with the decision of this Court in

Wiley, i.e., protect the interest of the employees and promote industrial peace.

3. The decision below on question two conflicts with the principle stated by this Court in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1961) and reiterated in *Wiley* v. *Livingston*, 376 U. S. 543, 547, that the obligation to arbitrate is contractual.

(a) In *Wiley*, this Court stated (p. 547), "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty" and "an employer has no obligation to arbitrate issues which it has not agreed to arbitrate." Applying this criteria to the collective agreement here discloses that the seller did not agree to arbitrate whether a future purchaser of the plant must recognize the agreement. It gave the arbitrator jurisdiction to interpret, apply and determine compliance with only "the provisions of this agreement." The agreement was solely with the seller. It contained no provisions pertinent to a sale of the property and no provision with reference to successors and assigns. Nowhere in the agreement is there any provision to indicate that the parties thereto expected (certainly did not agree) to arbitrate whether the contract itself was binding on either party or a successor of either party. Article IX denying jurisdiction and authority in the arbitrator to "add to, detract from, or alter in any way the provisions of this contract" makes it clear that an arbitrator could find the agreement applicable to Petitioner only by going outside of the contract and dispensing "his own brand of industrial justice." *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 597 (1960).

(b) This same principle applies to the grievance with reference to failure to comply with the alleged seniority

provision. There is an unresolved issue in the pleadings as to whether the collective agreement in effect at the time of the purchase included the seniority clause. Uncontradicted affidavits before the District Court state that this clause had been abandoned. Seniority is contractual. In the absence of a contract obligation, express or implied from plant practices, or statute creating seniority, there can be no seniority rights. *Trailomobile Co.* v. *Whirls,* 331 U. S. 40, 53 (1957); *Fagan* v. *Penn. R. R. Co.,* 173 F. Supp. 465, 470 (E. D. Pa. 1959); *Flowers* v. *Locomotive Fireman and Enginemen,* 212 Ga. 142, 91 S. E. 2d 41, 43 (1956). There could be no agreement to arbitrate the interpretation and application of or compliance with a provision that was not a part of the contract.

Whether there is an agreement to arbitrate a grievance with reference to seniority or an agreement to arbitrate the recognition by the purchaser of an unexpired collective agreement of the seller are legal questions to be decided by the court, not an arbitrator. *Atkinson* v. *Sinclair Refining Co.,* 370 U. S. 238, 241. In *Wiley,* this Court did not hold that the entire collective agreement was binding on a successor-employer. Also inherent in the arbitration of these grievances is the statutory prohibition against arbitrating with a decertified union, discussed *supra* pp. 7-10.

4. On the issue of check-off, Section 302 of the National Labor Relations Act, as amended (29 U. S. C. § 186) prohibits in general the delivery or payment to or receipt by any labor organization which represents or seeks to represent an employer's employees or admits such employees to membership, of any money or thing of value from an employer, unless a written assignment in the prescribed form from each employee from whose paycheck the amounts are to be deducted has been delivered to the employer. The collective agreement between seller and Respondent provided for the deduction of union dues "from the pay

of employee who gives written authorization to the Company for such deduction." The authorizations delivered to the seller were addressed to the seller. Respondent delivered to Petitioner no check-off authorizations from any of Petitioner's employees. Petitioner could not lawfully check off Respondent's union dues in the absence of valid check-off authorizations from employees. *Carpenters Union* v. *Ebanistiria Quintana,* 56 LRRM 2391 (D. P. R. 1964); *New Jersey Bell Telephone Co.* v. *Communication Workers of America,* 5 N. J. 354, 75 Atl. 2d 721, 728 (1950).

It would not be in the interest of industrial peace to compel arbitration of this issue, involving a clearly illegal act, on the basis indicated by the Court below, that if the arbitrator found for Respondent the award could not be enforced. On that basis, the Court would be justified in compelling arbitration of an issue, to take an extreme example, requiring murder.

If a check-off provision in a seller's contract is to be binding on a purchaser of the plant property, it is of substantial importance for the employer, the employees and the labor organization to know whether the wage deduction authorizations delivered to the seller authorize deductions by the purchaser in accordance with Section 302 of the Act (29 U. S. C. § 186), or whether new authorizations must be delivered. This is a legal question which as a general rule an arbitrator is not competent to handle. A hearing before an arbitrator as to the existence or validity of such obligations can accomplish nothing and may well arouse the resentment of the employees.

5. The decision of the Court below on question two with reference to check-off also conflicts with the decision of the Sixth Circuit, *Modine Mfg. Co.* v. *Grand Lodge Int. Ass'n of Mach.,* 216 F. 2d 326, 329, that a provision for check-off of dues cannot be enforced by a decertified union.

The Sixth Circuit stated in that case that the check-off of dues to a union that has been decertified by the Board, would run counter with the entire spirit of the Act (216 F. 2d 326, 329 (CA 6, 1954)). Petitioner should not be required to arbitrate whether it must violate the Act. *McLeod* v. *Television & Radio Artists,* 234 F. Supp. 832, 842 (D. N. Y. 1964) *aff'd per curiam* 351 F. 2d 310 (CA 2, 1965); *Smith* v. *Gladney,* 128 Tex. 354, 98 S. W. 2d 351, 352 (1936); *Loving & Evans* v. *Blick,* 33 C. 2d 603, 204 P. 2d 23, 28 (1949).

6. This case involves substantial questions of law under the Act pertaining to the recognition to be accorded a certification of the National Labor Relations Board and the issues which a successor-employer must arbitrate under the collective agreement of its predecessor. These questions are of great importance in the administration of the Act and to the collective bargaining relationship throughout the country.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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November 7, 1967.

APPENDIX A.

National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, et seq.)

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of

the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * *

The duties imposed upon employers, employees, and labor organizations * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. . . .

* * * * *

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. . . .

* * * * * *

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a peti-

tion alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

• • • • • •

Sec. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and

adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in the formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the 'Service,'. . .

* * * * *

Sec. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he

shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Sec. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall —

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings

as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

• • • • •

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

• • • • •

(c) for the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

• • • • •

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

* * * * *

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

* * * * *

(c) the provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; . . ."

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS,
For the Fifth Circuit.

No. 23918

UNITED STATES GYPSUM COMPANY,
Appellant,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(September 21, 1967.)

Before BROWN, *Chief Judge,* SIMPSON, *Circuit Judge,* and SUTTLE, *District Judge.*

BROWN, *Chief Judge:* The basic question in this case is whether the purchaser of assets of the predecessor employer can be compelled to arbitrate grievances under the collective bargaining contract between the employer and the union certified as the bargaining representative. Subsidiary, but perhaps more vexing, questions concern the Union's right to assert the grievance, demand arbitration or secure arbitral relief with respect to post-expiration periods, and both substantively and in point of time, with

respect to post-decertification periods. In a § 301, 29 USCA § 185, suit the District Court ordered arbitration. The Successor-purchaser appeals. We affirm.

The facts are neither complex nor conflicting. On April 1, 1965, the Successor[1] purchased all property and assets of the Employer[2] at its lime plant in Montevallo, Alabama, not including cash and accounts receivable. The sales purchase agreement undertook to exclude from the purchase the bargaining contract between Employer and Union.[3]

This collective bargaining contract was for a term of three years, expiring March 30, 1967, two years subsequent to the asset acquisition by The Successor. The Union was not, of course, a party to the purchase contract. Indeed, actions of the Employer and the Successor reflected their judgment that the interest of the employees and the Union was none of their concern.[4] As though for all purposes—and certainly for labor relations—the enterprise was completely new and divorced from the prior operations, the Successor processed applications for employment and on April 5 hired all of Employer's former employees (note 4 *supra*) except three. Except that the Successor did not check off union dues, determined seniority as of the date of employment with it, and by agreement installed a health insurance plan, the terms of employment were substantially the same as before the purchase. So too, was the physical operation—same work force, same plant, same process,

1. United States Gypsum Company. We use this as a handy shorthand descriptive, not as a prejudgment of the legal issue.

2. United Cement Company, Inc.

3. United Steelworkers of America, AFL-CIO, Local Union No. 5674, and United Steelworkers of America, AFL-CIO.

4. The Employer on March 19 and 22 notified its employees of the impending purchase and the opportunity to apply to The Successor for new employment. On March 28, prior to consummation, the Employer formally terminated all employees.

same product (except for trade name) under the same supervisors.

In May, 1965, the Union, expressing "the desire * * * promptly to resolve the dispute about our contract * * * so that the parties may continue to enjoy the collective bargaining relationship" existing since 1958, pursued the contract procedure including arbitration for settlement of grievances.[5] The Successor, refusing to arbitrate, commenced action before the National Labor Relations Board. After a few set backs, this ended successfully in a formal decertification of the Union.[6]

The Successor attacks the decree on a number of fronts. First, it denies that the predecessor contract is binding on it. Second, even if it is, then the contract cannot impose obligations as to the future, or in any event after decertification. And, third, whatever the decision on first and second, none of these grievances (note 5 *supra*) is substantively arbitrable.

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5. The "Grievance Report" dated May 17, 1965, reads:

"1. The Company refuses to recognize and comply with the contract executed on March 30, 1964.

"2. The Company has filed [filled] vacancies such as burner helper without complying with Article VIII of the contract.

"3. The Company has failed and refused to deduct union dues in accordance with Article VI of the contract.

"4. The Company has refused to recognize seniority as established in Article VIII of the contract.

"5. The Company has announced that it is not bound by said contract.

"6. The Company has refused to recognize or deal with the duly authorized officers and representatives of the Union."

6. The Board's decision ordering election is dated October 28, 1966, subsequent to the May 27, 1966, judgment below. United States Gypsum Co. Case No. 10-RM-441, 161 NLRB No. 61. The decertification is dated December 2, 1966. The Board had earlier declined to accept The Successor's representation petition. United States Gypsum Co., March 11, 1966, 157 NLRB No. 60.

We deal specifically with this in part III, *infra*.

I.

When all is said and done the Successor's attack on the binding force of the contract is a frontal, massive assault on *Wiley*.[7] For while a diversionary thrust is made on the factual distinction that this is an asset acquisition, not a consensual merger, the Successor cannot escape from the Court's expressed unwillingness to cast its decision in terms of title, property or corporate niceties.

"This Court has in the past recognized the central role of arbitration in effectuating national labor policy. * * * It would derogate from 'the federal policy of settling labor disputes by arbitration' * * * if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same." 376 U. S. at 549. The important thing to the Court was the "substantial continuity of identity in the business enterprise before and after a change," 376 U. S. 543, 551. The Court very frankly recognized that it was not dealing with traditional notions of contract law, assumption by successors, or the like.

"The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. We find none. While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. * * * Therefore, although the duty to arbitrate

7. *John Wiley & Sons* v. *Livingston*, 1964, 376 U. S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898.

* * * must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that *Wiley* did not sign the contract being construed." 376 U. S. at 550. This is, of course, entirely in keeping with the trilogy[8] opinions which cast the problem in terms of effective labor relations using the collective bargaining-compact as a sort of "common law" of the shop, *Warrior & Gulf, supra,* 363 U. S. 564, 578-79, not a bond to be read and applied by judges under the usual contract principles.

The Successor's complaint is the bald one that *Wiley* and those cases specifically applying it to asset acquisitions[9] are simply wrong.

We may grant that the assault is well constructed and formidable, resting primarily on the assertion that from deficiencies in advocacy, the Court was either led or pushed into error. The main thread has two strands. The first is that *Wiley* failed to reckon with the deeply ingrained, deliberate Congressional policy against compulsory arbitration which is brought forward as a part of the LMRA.[10]

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8. *United Steelworkers* v. *American Mfg. Co.,* 1960, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 1960, 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 1960, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424, which followed on the icebreaker, *Textile Union Workers* v. *Lincoln Mill,* 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972.

9. *United Steelworkers* v. *Reliance Universal Inc.,* 3 Cir., 1964, 335 F. 2d 891; *Wackenhut Corp.* v. *United Plant Guard Workers,* 9 Cir., 1964, 332 F. 2d 954; *Monroe Sander Corp.* v. *Livingston,* S. D. N. Y. 1966, 262 F. Supp. 129; cf. *McGuire* v. *Humble Oil & Ref. Co.,* 2 Cir., 1966, 355 F. 2d 352.

10. The Sucessor refers to the rejections of binding arbitration in the formulative process of the Taft Hartley Act. See S. Rep. 105, 80th Cong., 1st Sess., Part 2, p. 1 (April 22, 1947); p. 28 (April 17, 1947); H. Rep. 510, 80th Cong., 1st Sess. pp. 35, 62-63 (June 3, 1947); pp. 100-102 (April 11, 1947); also *NLRB* v. *American National Ins. Co.,* 1952, 343 U. S. 395, 72 S. Ct. 824, 96 L. Ed. 1027.

"The National Labor Relations Act is designed to promote in-

The second is that through ineptness of the adversaries or self interest of the successor the Court had pressed on it the "continuity of identity"[11] test presumably in the hopes that factually the Court would find it not to have been satisfied. Out of self interest of a litigant this was to introduce a beguiling, though erroneous, concept. This, the argument runs, is so because it fails to reckon with the distinction between a successor employer's duty to (a) recognize and bargain with the collective bargaining representative of the predecessor employer,[12] and (b) the scope of such successors obligation actually to reach a contract.[13]

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dustrial peace by encouraging the making of voluntary agreements governing relations betwen unions and employers. The Act does not compel any agreement whatsoever between employees and employers." 343 U. S. 401-2.

11. The Successor urges that in *recognition*, i.e., rep[illegible]entation cases, the Board has used this test. See, e.g., Johnson [illegible]ady-Mix, 142 NLRB 437, 442 (1963); Alamo White Truck [illegible]vice, 122 NLRB 1174 (1959), reversed, *NLRB* v. *Alamo White [illegible]ruck Service, Inc.*, 5 Cir., 1959, 273 F. 2d 238; Krantz Wire, 97 NLRB 971 (1952), enforced sub nom *NLRB* v. *Armato*, 7 Cir., 1952, 199 F. 2d 800, 803.

12. Section 8(a)(5) of the Act, 29 USCA § 158(a)(5) makes it an unfair labor practice for an employer:

> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 9(a) of the Act, 29 USCA § 159(a), making it clear that only the employees count on the question of recognition, states:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

13. Section 8(d) of the Act, 29 USCA § 158(d), makes it clear that the duty to bargain does not necessarily compel agreement:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising

Apparently this leads the Successor to conclude that while it had (until decertification) the (a) duty to recognize and bargain in good faith, it had no duty to (b) conclude an agreement and since it could not be compelled to reach an agreement, it could not be forced to accept an agreement made by others.

We may grant also that the Court may, and sometimes does, repudiate even its very recent holdings[14] and that under extraordinary circumstances a lower Federal Court may or should do so in advance.[15] But without the slightest whisper of a possible suggestion that the Supreme Court ought to take such action under the importunities of these arguments, we find it enough to say that it is for the Supreme Court, perhaps in this very case, not us, to so declare.

The Trial Court was correct in holding that the predecessor contract bound the Successor to arbitrate claims under it.

II.

Despite this holding the Successor maintains several additional contentions. One is that the arbitration cannot reach matters which occur subsequent to the acquisition of assets.

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thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; * * *"

See also S. Rep. 574, 74th Cong., 1st Sess., p. 12 (1935); *NLRB* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U. S. 1, 45, . . . S. Ct. . . ., . . ., 81 L. Ed. 893, 916; *NLRB* v. *American National Ins. Co.*, *supra*, 343 U. S. at 405, 408-09.

14. *Swift & Co., Inc.* v. *Wickham*, 1965, 382 U. S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194, overruling *Kesler* v. *Dep't of Public Safety*, 1962, 369 U. S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641.

15. *Bass* v. *State of Mississippi*, 5 Cir., 1967, . . . F. 2d . . ., . . . (No. 24029, . . .); *Browder* v. *Gayle*, D. C. Ala. (3 Judge), 1956, 142 F. Supp. 707, 716 & n. 14.

This argument is based essentially on the notion that *Wiley* dealt only with *vested* rights. But to talk in such terms is to introduce a new controversy, not solve the present one. For the critical thing is what is meant by "vested." The rights must, of course, be "vested" in the sense that the contract during its effective term accorded the rights. But it is a mistake to assume that they must have so far ripened into a grievance that they then represented a present claim for present relief. For as we have recently pointed out in *Boeing*,[16] the subsequent reversal in *Kimball Piano*[17] revealed clearly the Court's holding that arbiters could determine as a matter of contract law that it is entirely possible for a collective bargaining contract to accord rights and benefits which will come into play and be subject to appropriate enforcement—by arbitration or court action—even after the expiration of the contract.

III.

Now we face the more difficult problem of decertification. In the ordinary course of events, a collective bargaining agreement entered into by the union and the employer will be binding on the employer, or his successor, until it expires. The Successor urges, however, that the formal decertification of the Union (see note 6 *supra*)[18] obliterated any obligation on the part of the Successor to recognize the Union or to submit the grievances asserted by the Union under the contract to arbitration. This contention rests

16. *Boeing Co.* v. *International Ass'n of Machinists*, 5 Cir., 1967, . . . F. 2d . . ., . . . nn. 12-14 and accompanying text (No. 24,245, . . .).

17. *Piano & Musical Instruments Workers Union Local 2549* v. *W. W. Kimball Co.*, 7 Cir., 1964, 333 F. 2d 871, reversed per curiam, 379 U. S. 357, 85 S. Ct. 441, 13 L. Ed. 2d 541.

18. The decertification occurred on December 2, 1966, during the term of the contract, which was not to expire until March 30, 1967.

upon the bald assertion that the Union, subsequent to its decertification, has no right to enforce the agreement or any of its provisions.[19] We reject this broad claim.

In the present context, the issue thus presented raises these kind of problems. The primary inquiry relates to the availability of substantive rights accorded to the employees under the contract. But these rights are of four main classes. There will be (a) those which become effective during the term of the contract, (b) those coming into effect after the expiration of the contract (see part II *supra*), and (c) after decertification of the union, or (d) after both (b) and (c). A distinction must also be drawn between this substantive inquiry and the related problem of who has the right (or duty) to champion such substantive rights. Specifically, we are here concerned with the right of the Union which has since been decertified to assert grievances on behalf of the employees (1) up to its decertification and (2) after its decertification.

In the Congressional scheme for collective bargaining, the recognized union representative has not only the right but the duty to act on behalf of all members of the class.[20]

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19. The Successor cites *Retail Clerks* v. *Montgomery Ward & Co.*, 7 Cir., 1963, 316 F. 2d 754; *Glendale Mfg. Co.* v. *Local 520, International Ladies Garment Workers Union*, 4 Cir., 1960, 283 F. 2d 936. These cases antedated the Supreme Court's holding in *Wiley*, and did not therefore take into consideration the problems, hereinafter discussed, that *Wiley* raised.

20. This comprehensive notion received early, spectacular development under the Railway Labor Act 45 USCA § 151, et seq. which imposes upon the union as the exclusive bargaining representative of a craft or a class of Railway employees the duty to represent all members without discrimination. *Steele* v. *Louisville & Nashville R. R.*, 1944, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall* v. *Brotherhood of Locomotive Firemen and Engineers*, 1944, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187, *Graham* v. *Brotherhood of Locomotive Firemen and Engineers*, 1949, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22. Under § 9(a) of the LMRA, 29 USCA § 159(a), it is a statutory mandate.

"(a) Representatives designated or selected for the purposes

It must be borne in mind that what we are talking about relates only to the right of the Union to act as the champion for the employees to assert their substantive rights under the contract. The duration in time of the substantive rights themselves is not affected by decertification. Decertification cannot ordinarily extinguish substantive rights. But it might have a powerful effect on whether the union can champion those rights. This problem essentially comes down to the judge-made balancing of competing factors.

On the one hand is the reflex to the statutory duty to deal only with the representative chosen by the majority. The duty to deal is strong. But no less stringent is the duty not to deal with one having only minority support.[21] But to take the easy, almost mechanical, doctrinaire approach that loss of majority status extinguishes the union's power (duty) to act ignores other vital interests—indeed, interests which need protection and which will be lost unless an ardent advocate of them is available.

Here we speak of the employees in terms of their bread and butter personal interest in "rates of pay, wages, hours of employment, or other conditions of employment" § 9(a), 29 USCA § 159(a) and see § 2(5) 29 USCA § 152(5), embodied in the contract.

It is one thing for an employee or group of employees to have rights giving rise to benefits which are immediately due. It may be quite another thing to make them effectual. Here the disparity in economic strength and resources is sharply revealed. Here the worker needs an advocate able

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of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment • • • ."

21. Indeed it may be an unfair labor practice to do so. *International Ladies Garment Workers Union* v. *NLRB*, 1961, 366 U. S. 731, 81 S. Ct. 1603, 6 L. Ed. 2d 762.

to match these opposing strengths. To leave the individual worker to his own devices and resources in the name of legislation designed to equalize positions is to ignore the rich history of labor-management relations and to frustrate a primary aim of such legislation. Industrial strife—and its opposite industrial peace—can come from big issues. But frequently it comes from small, occasionally almost petty, controversies. Nationwide activity can grind to a halt over the question of who is to throw a switch. Problems which to the outsider seem petty are thought by the adversaries to be matters of great principle, if not principal.

Whether these differences arise in the formative process of bargaining leading up to the contract, or that continuous bargaining duty in the performance of such contract, the employees need a champion having an ardent interest and ample resources. Since the union has presumably obtained the disputed "right" in the first instance by getting it in the contract, there does not seem to be any reason why it should not be the champion of that right when the controversy comes alive, certainly not where there is then no competing union claiming to be the contemporary bargaining representative.[22]

This result obviously is called for as to those substantive rights which arise under the contract and ripen into some relief which becomes operative prior to decertification. Such grievances (see note 5 *supra*) are ones which arose under the contract and for breach of which effective relief was available prior to decertification.[23] With respect to grievances relief for which is operative up to the time of decertification the Union clearly has the right to assert them.

22. No rival union claims to represent the Successor's employees.

23. The substantive nature of these grievances as well as the role of the arbitrator is treated in detail in part IV *infra*.

With respect to those substantive rights arising out of the contract but which ripen into relief which becomes operative subsequent to decertification of the Union, additional factors arise. One, of course, is the substantive right to future benefits. But existence and validity of the substantive right itself would be, initially at least, a question for the arbitrator. This in turn depends on which rights by their very nature have viability beyond the expiration of the contract. Classic among those rights which may arise under the contract yet not ripen into effective relief until many years after the contract has expired is the right of seniority, or rights under a welfare or pension plan. On the other hand, some rights expire by their own terms with the contract. Again, this will be a question for the determination of the arbitrator. We emphasize this as it serves to illustrate the fallacy of using such terms as "accrued" or "vested" to describe the nature of the substantive rights of employees under a collective bargaining agreement. These terms merely compound the problem without contributing to its solution.

Another, and more important factor, is the element of time. If the Union responsible for "negotiating" or "consummating" the contract has the right (duty) as to post-decertification relief it is quite possible that such matters might not arise until years later. This poses practical and substantial problems not easy of solution. It might even, for example, permit a union long since rejected to come into a plant, demand the right of inspection, the production of records, etc., to determine whether as to some of its former members the "old" contract is being fulfilled. On the other hand if that "old" union does not have the right (duty), the long-time employee may lose value, then enforceable rights growing out of the "old" contract. Just as with other disputes such employee needs a champion.[24]

24. Indeed he might need the "old" union as his advocate even if another union was then certified if the "right" in dispute was wrapped up in antagonistic union policy.

What we have briefly outlined makes it wise that we refrain from a determination of this aspect except to hold that such claims may be the subject for the arbitration now ordered. The arbiters may never make an award as to them. We should wait until enforcement proceedings or otherwise the issue is inescapably presented.

Having determined the Union's right to assert the grievances here in question, we need not pass on the merits of the Union's attack on the Board ordered election and resulting decertification. At the outset, it recognizes that this representation action of the Board is not reviewable as such, but asserting that there ought to be at least an equality with an employer's right to contest an RC order through a § 8(a)(5) proceeding, it asks that we do so here.

The Union contends that this election, occurring during the term of a three-year contract and at a time when the Union was actively asserting the rights of its members, flies in the teeth of the Board's own contract bar rules.[25] The Union charges that in contravention of the Board's own rules, the Board here ordered an election which resulted in the loss by the Union of its certified status during the contract term. The Union asserts that there is an added reason to hold the Board's act invalid since the loss of majority status was primarily the result of the Successor's failure to recognize the Union as the bargaining

25. The statute provides only that "no elections shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have held." 29 USCA § 159(c)(3). Under the Board policies, however, "contracts for definite duration for terms up to three years will bar an election for their entire period; contracts having longer fixed terms will be treated for bar purposes as three-year agreements and will preclude an election for only their initial three years." *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). "Agreements of longer duration, as a majority of the Board has recently held, will, however, bar for their entire term an election sought by the contracting employer or the contracting certified union." *Id.* at 1125 n. 7.

agent of the employees, or to comply with its obligations under the contract. This, it contends violates the holdings of this Court. "In a case concerning a Successor employer, principles of fair play require that we look to the time of the succession to determine if the Union represents a majority of the employees. The employer is not without remedy. The employer's proper course is to [1] recognize the prima facie union representation of the employees and [2] to continue to deal with the union, but [3] to petition the Board for a new election."[26] *NLRB* v. *Auto Ventshade, Inc.*, 5 Cir., 1960, 276 F. 2d 303, 307. Since in this case, the Successor gave no recognition to the Union, to allow the Successor now to avoid its contractual obligations which ripened into effective relief prior to the Union's decertification would, it urges, only encourage purposeful delay on the part of employers in derogation of the stable relationship an avoidance of industrial strife sought to be achieved by the Act.

But this record which contains nothing that was before the Board in its undulating decisions[27] (see note 6 *supra*) gives us no sure basis for declaring its actions invalid assuming—a big assumption—that we have the power. But these factors do go a long way toward supporting our basic decision that compelling this limited post-decertification recognition by the employer of the repudiated representative is consistent with the policies sought to be achieved by the Act. The Second Circuit, in *NLRB* v. *Warrensburg Board & Paper Corp.*, 2 Cir., 1965, 340 F. 2d 920, was faced with the question whether an employer could be required by the Board to enter into a contract with a duly certified union when the contract, if it had been properly signed, would have expired prior to the Board's enforcement order,

26. Numbers in brackets [1], [2] etc., inserted for emphasis.

27. To these must be added the unsuccesful efforts of the Union to get the General Counsel to accept unfair labor practice charges against the Successor.

where the employer had granted the benefits sought by the Union, and where the Union had lost its majority status. In upholding the Board's order, the Court noted that "were we merely to weigh the respective equities of the parties we might be inclined to deny enforcement of the Board's orders or, alternatively, to require that the Board conduct another representation election. There are arguments against subjecting the large majority of the employees to the leadership of the Union which they have repudiated and to the terms of a two-year contract which by this time would have expired. It would do violence to the Act, however, so to hold, for failure to enforce would encourage purposeful delay in other cases." 340 F. 2d at 923. See also *Brooks* v. *United States,* 1954, 348 U. S. 96, 75 S. Ct. 176, 99 L. Ed. 125.

We hold, therefore, that the Union has the right to assert these grievances and that the Successor must submit them to arbitration under the contract.

IV.

Finally the Successor asserts that notwithstanding our holding that it is bound by the agreement to arbitrate, none of these grievances (note 5 *supra*) present substantively arbitral issues.

Contract Assumption.[28]

In claiming that the contract could not be interpreted to apply in the future—i.e., subsequent to the asset acquisition—this argument of the Successor is essentially a rehash of the reasons found wanting in Part I and that portion of the arguments discussed in Part III resting upon the asserted duty of an employer to discontinue recognition of a Union once it has been repudiated by the employees.

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28. Grievances 1 and 5, note 5 *supra.*

THE RECOGNITION PROVISION.[29]

The Union seeks by this claim to impose upon the Successor the contract obligation[30] to recognize the Union as the employee's representative. As such it is, of course, closely aligned with grievances 1 and 5 just discussed.

The argument here is four fold. First, *Wiley*, did "not suggest any view on the question surrounding a certified union's claim to continued representative status following a change in ownership." 376 U. S. 543, 551.

Second, having been decertified it has lost its representation status "any right to recognition as bargaining agent which (the Union) secured by virtue of (its contract) ceased and became inoperative on decertification" *Retail Clerks International Ass'n* v. *Montgomery Ward & Co.*, 7 Cir., 1963, 316 F. 2d 754, 757; *Glendale Mfg. Co.* v. *Local 520, Internat'l Ladies Garment Workers*, 4 Cir., 1960, 283 F. 2d 936. Third, directing arbitration puts the industrial relations on a collision course between the order of the Board and a possible award of the arbitrator. See *New Orleans Typographical Union* v. *NLRB*, 5 Cir., 1966, 368 F. 2d 755.[31] Fourth, this is not really a grievance under the contract. Rather it is, and charges, an alleged unfair

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29. Grievance 6, note 5 *supra*.

30. ARTICLE II.

"RECOGNITION.

"A. The Company recognizes the Union as the collective bargaining agent for its production and maintenance employees, excluding office clerical employees, professional employees, watchmen and/or guards, and all supervisors as defined in the Act, as amended."

31. Compare *Carey* v. *Westinghouse Elec. Corp.*, 1964, 375 U. S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320.

labor practice under § (a)(5), 29 USCA § 108(a)(5) of the Act and this is exclusively within the Board's jurisdiction.[32]

None of these reasons outlaw this claim from arbitration. For these are either questions for the arbiter's initial decision or are matters which may be controlled, fully or in part, in the Court review of any enforcement proceedings especially as to the extent to which the award grants post-decertification relief of a kind possibly involving illegal recognition.

Check-off of Dues.[33]

Besides pointing out the obvious fact that this is closely intertwined with the recognition-representation grievance and the decertification of the Union (Part III), the Successor urges that no arbiter could award check-off of dues and hence this issue is not arbitral as a matter of court-declared law. It insists, first, that with loss of representation the Union could not rightfully collect dues since it is rendering no service. *Modine Mfg. Co.* v. *Machinists,* 6 Cir., 1954, 216 F. 2d 326. Second, and more important, § 302 of LMRA, 29 USCA § 186, strictly requires written authorizations from the employees to the deducting employer, which is lacking here since the only ones in existence were given to the predecessor employer, not the Successor. Third, for good measure, these violate Alabama law, Ala. Code Title 26, § 395 (5) and Title 39, § 201.

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32. The Successor presses:
Myers v. *Bethlehem Shipbuilding Corp.*, 1938, 303 U. S. 41, 48, . . . S. Ct. . . ., . . ., 82 L. Ed. 638, 642;
Alexander v. *Pacific Maritime Ass'n*, 9 Cir., 1963, 314 F. 2d 690, 692, cert. denied, 1964, 379 U. S. 882, 85 S. Ct. 150, 13 L. Ed. 2d 88;
Belsinger Signs, Inc. v. *Electrical Workers*, D. C., 1964, 231 F. Supp. 741, aff'd, D. C., Cir., 339 F. 2d 742;
Portland Web Pressmen's Union v. *Oregonian Pub. Co.*, 9 Cir., 1960, 286 F. 2d 4, 10.

33. Grievance 3, note 5 *supra.*

Again none of these contentions exclude arbitrability. Each goes only to the possibility of nonenforcement depending on the arbiter's decision.

The Seniority Issue.[34]

The big contention here is that despite express provisions in the contract (Art. VIII) for seniority, the parties by acquiescence had not enforced it. This is a classic question for arbitral determination. *Cf. Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 1967, ... U. S. ....., ... S. Ct. ....., ... L. Ed. 2d ..... [35 L. W. 4575, June 12, 1967].

Decision by Arbiter.

We should sound this caveat with respect to our comments in Part IV on arbitrability of these grievances. Nothing we say is even a remote suggestion of how the merits are to, or must, be determined. We must school ourselves against the beguiling importunities of deciding the merits in the guise of adjudicating the court-reserved issue of the scope, if any, of the agreement to arbitrate.[35] Additionally, where unusual situations are presented involving possible clashes between arbitral and Board determinations, between policies for arbitration and for authoritative administrative disposition, the determination that each grievance is arbitral is that and nothing more. Such pro-

34. Grievances 2 and 4, note 5 *supra*.

35. *Oil, Chemical & Atomic Workers Internat'l Union* v. *Southern Union Gas Co.*, 5 Cir., 1967, . . . F. 2d . . ., . . . [No. 23942, June 27, 1967, slip op. p. 5]; *United Steelworkers* v. *American Internat'l Alum. Corp.*, 5 Cir., 1964, 334 F. 2d 146, 151; *Local 787, Internat'l Union of Electrical Workers* v. *Collins Radio Co.*, 5 Cir., 1963, 317 F. 2d 214, 216; *Sinclair Ref. Co.*, NLRB 5 Cir., 1962, 306 F. 2d 569, 570; *Taft Broadcasting Co.* v. *Radio Broadcast Technicians Local 253*, 5 Cir., 1962, 298 F. 2d 707, 709; *International Ass'n of Machinists* v. *Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238, 242, rehearing denied, 1963, 316 F. 2d 90; *Lodge No. 12* v. *Cameron Iron Works, Inc.*, 5 Cir., 1961, 292, F. 2d 112, 117-18.

nouncement does not begin to put an advance Court imprimatur on the award. That can await enforcement. "We make doubly plain that this opinion in no way indicates what, if any, decision an arbitrator should or must make. We hold merely that he should determine the grievance. Whether the decision or the remedy prescribed is, or is not, supportable is for another day." *International Ass'n of Machinists* v. *Hayes Corp., supra,* 296 F. 2d at 244. And for all we know this might wash out. *Cf. Byers* v. *Byers,* 5 Cir., 1958, 254 F. 2d 205; *City of Houston* v. *Standard Triumph Motor Co.,* 5 Cir., 1965, 347 F. 2d 194.

REMAND.

The Court's order requiring the Successor to proceed to arbitration of these grievances was therefore correct.

AFFIRMED.

APPENDIX C.

(161 NLRB No. 61)

UNITED STATES OF AMERICA,

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

UNITED STATES GYPSUM COMPANY, *Employer-Petitioner,* and LOCAL UNION No. 5674, UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, UNION.	Case No. 10-RM-441.

DECISION AND DIRECTION OF ELECTION.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer H. Carlton Bryan, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Thereafter, the Employer-Petitioner and Union filed briefs. The Employer-Petitioner also submitted a motion requesting permission to file a supplemental brief, and the Union filed a response thereto. The motion of the Employer-Petitioner is hereby granted and its supplemental brief has been considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer-Petitioner is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

(a) We are here concerned with a representation petition filed by an Employer, pursuant to Section 9(c)(1)(B) of the Act, seeking an election to determine the representative status of a labor organization previously certified by the Board as collective-bargaining representative of the production and maintenance workers.[1] In petitioning for such an election, an employer under present Board practice "must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification."[2] The Regional Director processed the petition in this case after administratively determining that the Employer had made a *prima facie* showing of such grounds. Thereafter, the Employer and Union, both at the hearing and before the Board, raised various objections to the Regional Director's action in resolving that particular issue administratively without permitting them to litigate the facts underlying his determination. We approve the procedure followed by the Regional Director; for, in our judgment, such approach is most compatible with effective administration of this phase of the Board's election processes. Thus the determination by administrative action protects the confidentiality of data

[1] The factual matters which are properly before the Board in the instant case were previously considered in an earlier decision involving the same parties and are reported at 157 NLRB No. 60.

[2] *United States Gypsum Company*, 157 NLRB No. 60.

submitted in support of the petition, and also permits an expeditious resolution of issues concerning employee choice of a bargaining representative whenever an election for such purposes is otherwise timely. Such procedure is particularly appropriate where, as in the instant matter, an election is sought to determine the course of an existing collective-bargaining relationship.

Accordingly, since the Regional Director has administratively determined that the requisite *prima facie* showing has been made herein,[3] and as the parties are not entitled to litigate this particular aspect of the representation proceeding, we are administratively satisfied that the Employer has met this requirement for processing the instant petition.

(b) The Union contends that its contract with the Employer's predecessor constitutes a bar to an election. Although the Employer was not a signatory to that agreement and did not assume the agreement on purchasing the plant, the Union urges that *Wiley & Sons* v. *Livingston*, 376 U. S. 543, compels us to hold that said agreement is binding upon the Employer and hence that the Employer's petition was untimely filed under the Board's contract bar rules. However, we deem it unnecessary for purposes of this case to determine the continuing viability of the contract, for, irrespective of the Employer's obligations, if any, with respect thereto, we are persuaded by the instant record that the purposes of the Act will best be effectuated by the direction of an immediate election herein.

4. The parties agree, and we find, that the following

[3] We wish to make clear, however, that as the Regional Director's determination is based solely upon an employer's *prima facie* showing, and is not litigable at any stage of the representation proceeding, his finding is not to be regarded as determinative of an employer's obligation to engage in further bargaining, or necessarily dispositive of a related refusal-to-bargain charge filed by an incumbent collective-bargaining representative.

employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(c) of the Act:

> All production and maintenance employees at the Employer's Montevallo plant, excluding office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in the Act.[4]

Direction of Election.

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 10 shall direct and supervise the election subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are em-

[4] The Employer would exclude, and the Union would include the bulldozer operator No. 1, the bulldozer operator No. 2, and four kiln operators. The Employer concedes that all three classifications were within the unit historically represented by the Union and that their duties are unchanged, but contends that, following its purchase of the plant, the responsibilities of those occupying these classifications have been redefined in a manner establishing supervisory status. The record shows that the employees occupying these positions are engaged essentially in rank and file work and it is clear that while they exercise lead authority over other employees of lesser skill and experience, their duties neither entail the exercise of independent judgment nor reflect any other attributes of supervisory status sufficient to warrant their exclusion. Accordingly, we find they are not supervisors and include them in the unit herein.

ployees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[5] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Local Union No. 5674, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO.

Dated, Washington, D. C. Oct. 28, 1966.

.....

FRANK W. McCULLOCH,
Chairman,

.....

GERALD A. BROWN,
Member,

.....

SAM ZAGORIA,
Member,

(SEAL) NATIONAL LABOR RELATIONS BAORD.

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[5] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 10 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB No. 111.

UNITED STATES OF AMERICA.

NATIONAL LABOR RELATIONS BOARD.

UNITED STATES GYPSUM COMPANY, *Employer-Petitioner,* *and* LOCAL UNION No. 5674, UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Union.*	Type of Election ☐ Consent Agreement ☐ Stipulation ☒ Board Direction ☐ RD Direction ☐ 8(b)(7) Case No. 10-RM-441.

CERTIFICATION OF RESULTS OF ELECTION.

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that no collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for any labor organization appearing on the ballot, and that no such organization is the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act.

Signed at Atlanta, Georgia on the 2nd day of December 1966.

(SEAL)

WALTER C. PHILLIPS,
Regional Director for Tenth Region National Labor Relations Board.

IN THE

Supreme Court of the United States

October Term, 1967

No. 803

UNITED STATES GYPSUM COMPANY, *Petitioner*

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether a union loses the right to arbitrate a grievance because, eighteen months after arbitration was demanded and six months after the district court ordered arbitration, the union is decertified by the National Labor Relations Board.

2. Whether, if a union's right to arbitrate is alleged to have been destroyed by a subsequent NLRB decertification, the union is entitled to litigate the validity of the decertification.[1]

3. Whether, in the circumstances of this case, the NLRB decertification was invalid.[1]

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[1] Questions 2 and 3 relate to an alternative argument presented by the Union to the court below in support of arbitration. In view of its disposition of Question 1, the court below found it unnecessary to decide these questions (Pet. App. xxi). We intend to advance them to this court, however, if certiorari is granted, as an alternative basis for affirmance, Cf. *Langnes* v. *Green*, 282 U.S. 531 (1931). For the benefit of the Court, we briefly describe the nature of these issues in Part II of this brief.

COUNTER-STATEMENT

Respondent (hereinafter "the Union") was the certified bargaining representative of the employees of the Montevallo, Alabama plant of United Cement Company. In that capacity, it negotiated a collective bargaining agreement which became effective on March 30, 1964, and was to run for a three-year term, i.e., until March 30, 1967.

On March 30, 1965, at a time when the agreement still had two years to run, Petitioner (hereinafter "the Company") purchased the Montevallo plant and continued to operate the plant without significant change. The Company announced, however, that it did not consider itself bound by the collective bargaining agreement, and it took steps which the Union believed to be violative of the agreement. Accordingly, on May 17, 1965, the Union submitted grievances alleging that the Company was violating the agreement, and demanded arbitration under the procedures specified in the agreement. It was the Company's obligation to arbitrate the Union's grievances when the demand was made. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964). The Company, however, refused to arbitrate, and on June 11, 1965, the Union filed this suit to compel arbitration.

Meanwhile, a few days after receiving the Union's grievances, the Company filed a petition with the National Labor Relations Board seeking an election to decertify the Union.

On May 27, 1966, nearly a year after the suit to compel arbitration was filed, the district court granted summary judgment in favor of the Union, and ordered the Company to arbitrate the grievances. The Court held that the Company, as a purchaser which continued to operate the plant without change, was obligated to arbitrate grievances under the seller's collective bargaining agreement. *John Wiley & Sons, Inc.* v. *Livingston, supra.* The Company filed an appeal to the Court of Appeals for the Fifth Circuit.

On October 28, 1966, while the Company's appeal was pending, the Board directed an election, which was held on December 2, 1966. Not surprisingly, in view of the Union's demonstrated impotence over more than a year and a half to get the Company to recognize it or arbitrate its grievances, the employees voted to decertify the Union.

The Company thereupon advised the Court of Appeals of the Union's decertification, and urged that it reverse the direction of arbitration, on the ground that as a matter of law a decertified Union cannot arbitrate grievances.

The Court of Appeals rejected the contention. It affirmed the district court's ruling that in light of *Wiley* the Company was obligated to arbitrate grievances under the agreement (Pet. App. xxii-xv). It then ruled that the subsequent decertification did not alter that result (*Id.* at xvi-xxiii). It noted that the Union was not decertified until a year and a half after it demanded arbitration of these grievances; that, had the Company not refused to arbitrate, the grievances would have been resolved long before the Union's decertification; and that, indeed, the Company's refusal to arbitrate might well have been one of the causes of the employees' decision to decertify the Union (*Id.* at xxi-xxii). The Court further noted that, in large part, the relief sought in the grievances was attributable to the period prior to the Union's decertification, and that if the Union were not permitted to arbitrate the grievances the employees would have contractual rights with no champion to enforce them (*Id.* at xviii-xxi). (The Court was careful to distinguish this case from those in which one Union is replaced by another, *Id.* at xix, n. 22). The Court noted the Company's conjecture that the arbitrator might render an award inconsistent in legal effect with the Board's decertification order, but stated that such questions could more appropriately be raised in enforcement proceedings if, after the arbitrator's award was rendered, such conflict appeared (*Id.* at xx-xxi).

Finally, having ordered arbitration notwithstanding the decertification, the Court found it unnecessary to pass upon the Union's alternative claim: that the Board's decertification of the Union was invalid (*Id.* at xxi-xxiii). (We discuss this claim more fully in Part II herein).

The Company, in its petition for certiorari, does not seek review of the correctness of *Wiley*.[2] The petition is limited to the issues stemming from the decertification of the Union.

ARGUMENT

I. THE WRIT SHOULD BE DENIED

In holding that the Union is entitled to arbitrate its grievances, the decision below is plainly correct and does not warrant review by this Court.

The Company's contention, stripped of legalistic jargon, is that it should reap the benefits of its own wrongdoing. The Company does not challenge the holding below that, at the time of the Union's demand, it was required to submit the grievances to arbitration. Its sole contention is that the decertification of the Union a year and a half later relieved it of that obligation. It thus seeks the benefit of the delay created by its own breach of contract. This effort comes with particular ill grace in this case for, as the Court below recognized, it may well have been the Company's refusal to recognize the Union or entertain its grievances which prompted the employees to decertify the Union. Declining arbitration would reward the Company's wrongdoing, and encourage other employers in similar situations likewise to refuse arbitration in the hope that the obligation ultimately would disappear. Moreover, since the grievances

[2] In the court below, the Company argued that *Wiley* was wrongly decided. The court, of course, held that it could not reverse a decision of this Court (Pet. App. xii-xv). The Company has now abandoned this tack; the petition does not seek reconsideration of *Wiley* by this Court.

all relate to events arising during the period prior to the Union's decertification, the Union is the appropriate party to enforce those rights. As the Court below recognized, to hold otherwise would extinguish employees' substantive rights by denying them the only agency capable of enforcing those rights.

The Company's claim that the decision below conflicts with *Garment Workers v. Labor Board (Bernhard-Altmann)*, 366 U.S. 731 (1961) is absurd. In *Bernhard-Altmann*, this Court held that an employer and union violated the Act by entering into their first agreement at a time when the union had not yet been selected by a majority of the employees. *Bernhard-Altmann* in no way precludes the decision below, which enforces arbitration of grievances filed while the Union was the certified bargaining agent involving alleged contractual violations occurring during the period the Union was certified. More to the point is *Brooks* v. *Labor Board*, 348 U.S. 96, 104 n. 18 (1954), in which this Court approved the Board's advice that an employer should continue bargaining with the certified union even after an apparent loss of majority, until the Board determines that the union should be decertified. See also, to the same effect, *NLRB* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920 (2d Cir. 1965).

The court below properly disposed of the Company's fears that the arbitrator might render an award conflicting with the Board's decertification ruling. These fears do not warrant denial of arbitration; rather, if the arbitrator provides relief in apparent conflict with the Board, the appropriate time for correction is in a proceeding to enforce or set aside the award. Cf. *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964).

Finally, the Company's contention (Pet. pp. 16-17) that, in ordering arbitration of the Union's checkoff claim, the decision below conflicts with *Modine Mfg. Co.* v. *Grand Lodge*, 216 F. 2d 326 (6th Cir., 1954), is erroneous. *Mo-*

dine held that a Union could not require a checkoff of dues for the period *after* it was decertified. Here, by contrast, the Union sought (and still seeks) a checkoff of dues for the twenty-one months *prior to* decertification, during which period it was the certified bargaining agent and contractually entitled to the dues.

II. IF THE WRIT IS GRANTED, ADDITIONAL QUESTIONS MUST BE CONSIDERED

In Part I, we have shown that the writ should be denied, because there is no warrant to review the decision of the court below ordering arbitration notwithstanding the decertification of the Union. In the event, however, that this Court should decide to grant the writ, it must pass upon the Union's alternative contention: that the Board improperly decertified it. Cf. *Langnes* v. *Green*, 282 U.S. 531, 538 (1931). While the court below found it unnecessary to decide this claim, if this Court were to conclude that decertification has the effects claimed by the Company then the validity of the decertification would be critical.

The Board's decisions in election cases are not directly reviewable. *American Federation of Labor v. Labor Board*, 308 U.S. 401 (1940). However, when collateral rights turn upon such decisions, their validity is litigable in the collateral proceedings. *Id.* at 406-07. The most common situation is when an employer refuses to bargain with a Union certified by the Board; the employer is allowed to challenge the validity of the certification, as a defense to the refusal to bargain charge. *Ibid.* Likewise, a Union accused of violating Section 8(b)(7) of the Act, 29 U.S.C. § 158(b)(7), by picketing within 12 months after a valid election, is entitled to defend on the ground that the election was invalid, *NLRB* v. *Local 182*, 314 F. 2d 53, 59-60 (2d Cir.

1963). So here, we submit that if a valid decertification would destroy our otherwise-extant right to arbitrate, we are entitled to show that the decertification is invalid and that our right thus survives.

Here, the decertification was invalid. In directing the election in which the Union was decertified, the Board departed from its own "contract bar" rule: that no election will be conducted during the first three years of a collective bargaining agreement. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). The Board provided absolutely no explanation for this deviation from its uniform rule, offering only the *ipse dixit* that "the purposes of the Act will best be effectuated by the direction of an immediate election herein." (Pet. App. xxx). The Board's departure is particularly egregious, for the Union was sent to its inevitable doom. The Company, having refused to recognize the Union or entertain its grievances for more than a year and a half, totally emasculated the Union in the eyes of the employees. In an ironic postscript, the Board rubbed salt in the Union's wounds by refusing to issue a complaint charging the Company with a refusal to bargain although, as the court below noted (Pet. App. xxii), under the Board's decisions the Company's conduct was plainly violative of the Act. Of course, by now this litigation has dragged on so long that even the contract has expired. That fact, however, cannot retroactively validate a decertification which was invalid when issued. Moreover, both the Board and the courts have recognized that in situations where the employer has repudiated the contract during its term, the appropriate remedy is to extend the contract for an additional period commensurate with that during which it was rendered ineffective, even though by then the Union has lost its majority status. *NLRB* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920 (2d Cir. 1965); *Schill Steel Products, Inc.*, 161 NLRB No. 83, 63 LRRM 1388 (1966); *Bever-*

age-Air Co., 164 NLRB No. 156, 65 LRRM 1377 (1967). The Union intends to suggest in arbitration that this is an appropriate remedy for the Company's breach.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 803

UNITED STATES GYPSUM COMPANY,
Petitioner and Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Appellee Below.

REPLY BRIEF.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OCTOBER TERM, 1967.

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UNITED STATES GYPSUM COMPANY,
Petitioner and Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Appellee Below.

REPLY BRIEF.

RESPONDENT'S "QUESTIONS PRESENTED".

Respondent's question 1 is based upon the erroneous assumption that Respondent remained exclusive collective bargaining representative of Petitioner's employees until it was decertified by the National Labor Relations Board.

Neither Respondent's question 1 nor Respondent's alternative questions encompass Petitioner's question 2 with reference to the arbitrability of the grievances *sub judice*. Its brief mentions this issue only with reference to the effect of Respondent's decertification on check-off.

RESPONDENT'S COUNTER-STATEMENT.

Respondent's counter-statement gives the obviously intended implication that no question of representation existed at the time Petitioner purchased the plant property. On the contrary, Respondent's certification as collective bargaining representative issued February 8, 1958, over 7 years prior to the purchase (R. 94).[1] Respondent had not contacted the seller after execution of its collective agreement in 1964 (R. 32) and Local Union No. 5674 had been acting for the employees and executed a written amendment to the collective agreement.[2] Respondent was not a party to this amendment (R. 28, 32). Respondent did not deliver to Petitioner any check-off authorizations (R. 30, 70) nor any evidence whatsoever of its representative status. Other information available to Petitioner indicated that Respondent did not represent a majority of the employees (R. 32-3). Although Petitioner's letter to Respondent of May 28, 1965 stated that Petitioner would negotiate with any union representing a majority of its employees and referred to a promised statement from Respondent of its representative position (R. 32-3, 38-9), Respondent filed its action in the District Court without submitting such a statement.

After Respondent's institution of the action, Petitioner filed its representation petition with the Board but at the hearing thereon Respondent opposed an election (R. 33, 97). Because of a change in the Board's rules with reference to an employer's representation petition, Petitioner filed a second representation petition and evidence of its

1. References to the printed record in the Court of Appeals are designated (R. ....).

2. The Local and International are separate and independent entities. *Quaker State Oil Refining Corp.* v. *NLRB*, 270 F. 2d 40 (CA 3, 1959); *Independent Stave Co., Inc.* v. *NLRB*, 352 F. 2d 553 (CA 8, 1965); *John L. Clemmey Company, Inc.*, 118 NLRB 599 (1957).

good faith doubt of Respondent's representation status (R. 91-92, 97-98). Respondent similarly opposed an election at the hearing on Petitioner's second petition (App. xxx).[3] The Board overruled Respondent's objections and ordered the election.[4] The election proved that Respondent did not represent a majority of Petitioner's employees (App. xxxiii). The delay in the election and decertification of Respondent was the result of Respondent's opposition thereto—not the fault of Petitioner.

Contrary to the last paragraph of Respondent's counterstatement (Br. 4, footnote 2), Petitioner's position below was that *Wiley*[5] was not applicable to the case *sub. judice*, not that the decision in *Wiley* was wrong. Contrary to the statement in this paragraph (Br. 4), that the petition is limited to issues stemming from the decertification, the grievances are unarbitrable for all of the reasons stated in the petition (pp. 14-17).

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3. References to the Appendices to the Petition are designated (App. ....).

4. Footnote 3 to the Board's decision, however, implied that Respondent might avoid an election by a refusal to bargain charge (App. xxx). Respondent filed such a charge but withdrew the same and filed no objections to the election.

5. *Wiley* v. *Livingston*, 376 U. S. 543 (1964).

ARGUMENT.

Respondent's argument assumes that Respondent had the status of a certified bargaining representative until its decertification and this assumption conflicts in principle with the decisions of the Board and Courts of Appeal for the Second, Sixth and other Circuits and prior decisions of the Court below with reference to a union's rights after it has ceased to be the representative of a majority of the employees.

In the first place Respondent's argument that Petitioner seeks the benefits of its own wrongdoing has no basis in the record. Petitioner's refusal to recognize Respondent or its contract was not unlawful. In *Celanese Corp. of America,* 95 NLRB 664, 671-2 (1951), the Board established the rule that if the employer has fair doubts about the union's continuing majority, he may refuse to bargain further with it.[6] Referring to this rule, this Court stated in *Brooks* v. *Labor Board,* 348 U. S. 96, 104, "This, too, is a matter appropriately determined by the Board's administrative authority." It has been followed by the Courts of Appeal for the Second Circuit (*NLRB* v. *Superior Fireproof Door & Sash Co., Inc.,* 289 F. 2d 713, 719 (1961)) and Sixth Circuit (*NLRB* v. *Electric Furnace Co.,* 327 F. 2d 373, 376 (1964)) and in decisions prior to this case by the court below (*NLRB* v. *Dan River Mills, Incorporated,* 274 F. 2d 381, 389 (CA 5, 1960); *NLRB* v. *Minute Maid Corporation,* 283 F. 2d 705, 710 (CA 5, 1960); *NLRB* v. *Florida*

6. This rule has been consistently followed by the Board. *Stoner Rubber Company, Inc.,* 123 NLRB 1440, 1444-5 (1959); *Mitchell Standard Corporation,* 140 NLRB 496, 499 (1963); *National Carbon Division,* 105 NLRB 441, 444 (1953); *American Laundry Machinery Company,* 107 NLRB 1574, 1583 (1954).

Citrus Canners Cooperative, 288 F. 2d 630, 639 (CA 5, 1961)).

Petitioner's refusal to assume Respondent's contract with the seller was not unlawful. This court, although urged to do so, did not go so far in *Wiley* as to hold that the merged corporation's entire collective agreement was binding on the resulting corporation. The Court below did not hold that the seller's entire agreement with Respondent was binding on Petitioner. The Board has consistently held that the collective agreement with a seller of a business enterprise, unless expressly assumed by the purchaser, does not bar a representation proceeding filed by a bona fide purchaser of the enterprise. *General Extrusion Co.,* 121 NLRB 1165, 1168 (1958); *Stubnitz Green Spring Corp.,* 113 NLRB 226, 228 (1958); *Jolly Giant Lumber Co.,* 114 NLRB 413, 414 (1955); *Rohlik, Inc.,* 145 NLRB 1236, 1242 fn. 15 (1964). This application of the Board's contract bar rule is likewise within the Board's discretion. *Local 1545, United Bro. of Carpenters etc.* v. *Vincent,* 286 F. 2d 127, 130-131 (CA 2, 1960); *NLRB* v. *Grace Co.,* 184 F. 2d 126, 129 (CA 8, 1950); *Kearney & Trecker Corp.* v. *NLRB,* 210 F. 2d 852, 857, cert. den. 1954, 348 U. S. 824. Respondent's assertion (Br. 7) that in the instant case the Board departed from its own decisions is without merit.

Respondent's argument also conflicts in principle with the rule that after the Board has issued a notice of hearing on a representation petition the employer is justified in refusing to bargain while the proceeding is pending. *Henry Heide, Inc.,* 107 NLRB 1160, 1163 (1954). Issuance of the notice of hearing indicates that the Board is of the opinion that a question of representation exists. *Brooks* v. *NLRB,* 348 U. S. 96, 103; *NLRB* v. *Electric Furnace Co.,* 327 F. 2d 373, 377 (1964). Furthermore, in the circumstances here present Petitioner would have violated the Act if it had

recognized or arbitrated[7] with Respondent while the representation petition was pending. *International Ladies Garment Workers Union* v. *NLRB*, 366 U. S. 731, 732-740 (1961); *NLRB* v. *Electric Furnace Co.*, 327 F. 2d 373, 377 (CA 6, 1964). While the election is not conclusive evidence that Respondent did not represent the majority of the employees at the time of the purchase, it is evidence of that fact.

There is no evidence in the record of any unfair labor practice by Petitioner. Petitioner did all in its power to settle the issue. It invited Respondent to furnish evidence of its status. Receiving none, Petitioner filed the representation petitions placing the matter under the jurisdiction of the Board, with the resulting decertification. If Respondent had evidence that the result of the election was due to any unfair labor practice of Petitioner, it should have filed objections to the election with the Board. *Irving Air Chute Co., Inc.*, 149 NLRB 627, 629 (1964); *Kaplin Bros. Co., Inc.*, 149 NLRB 1378, 1380 (1964). The Board is not a party to these proceedings and the validity of its action cannot be attacked here.

The Court below found that the record contained nothing to give it a "sure basis" to uphold Respondent's attack on the validity of the Board decertification. It nevertheless asserted (App. xxii), "these factors go a long way toward supporting our basic decision," *i.e.*, the need for a champion of possible rights of employees,[8] and qualified the statutory right of employees to be represented by a bargaining agent of their own choosing by affirming the order

7. The arbitration of grievances is a part and parcel of the collective bargaining process as defined in Section 8(d) of the Act (29 U. S. C. § 158(d)), *United Steelworkers of America* v. *Warrior & Gulf*, 363 U. S. 574, 578 (1960); *Timken Roller Bearing Co.* v. *NLRB*, 161 F. 2d 949, 954 (CA 6, 1947).

8. The Court below stated rights of employees which were nonexistent in this case (see Petition, p. 13).

that Respondent must be that champion regardless of the fact that it did not represent the employees and had been rejected by them in the Board conducted election. Also by compelling arbitration of the recognition of Respondent's collective agreement the Court below established a procedure by which terms and conditions of employment might be frozen for two years contrary to the federal policy of voluntary consummation of collective agreements through collective bargaining with representatives of the employees' own choosing.

CONCLUSION.

Respondent's arguments raise a substantial question as to an employer's obligation to bargain during the pendency before the Board of a representation proceeding as well as the questions pertaining to the recognition to be accorded a certification of the National Labor Relations Board and the issues which a successor-employer must arbitrate under a collective agreement of his predecessor referred to in the petition *sub judice*. It is respectfully submitted that a final determination of these questions is of great importance in the administration of the Act and to the collective bargaining relationship throughout the nation.

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December 18, 1967.